Stevens Ready-Mix Concrete Corporation *and* Robin Keith Whitehead, Petitioner and General Truck Drivers, Warehousemen and Helpers, Local No. 5. Case 15-RD-476

September 20, 1982

DECISION AND DIRECTION TO OPEN AND COUNT CHALLENGED BALLOTS

The National Labor Relations Board has considered determinative challenges in an election[1] held on June 19, 1981, and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings[2] and recommendations. Pertinent portions of the Hearing Officer's report are attached hereto as an appendix.

DIRECTION

It is hereby directed that the Regional Director for Region 15 shall, within 10 days from the date of this Decision, open and count the challenged ballots as recommended in the Hearing Officer's report, and thereafter prepare and cause to be served on the parties a revised tally of ballots, upon which basis he shall issue the appropriate certification.

CHAIRMAN VAN DE WATER and MEMBER HUNTER, dissenting:

We do not agree with the majority that the seven challenged voters were eligible to vote in the June 19, 1981, decertification election. In our opinion, these employees were lawfully terminated by the Employer for violating the no-strike clause of the contract under which they were covered.

International Union of Operating Engineers, Local 406, herein called the Engineers, represents a unit of operators employed by the Employer. General Truck Drivers, Warehousemen & Helpers, Local No. 5, herein called the Teamsters, represents the Employer's truckdrivers. On September 2, 1980, employees represented by the Engineers engaged in a lawful economic strike against the Employer. Seven employees represented by the Teamsters refused to cross the picket line established by the Engineers at the Employer's premises. The Employer sent telegrams to these employees advising them that they were in violation of the no-strike clause of its contract with the Teamsters and requesting them to return to work under threat of permanent replacement. The seven striking employees never returned to work, and their ballots were challenged when they attempted to vote in the decertification election.

Relying on the Board's opinion in *International Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee, Inc.)*, 238 NLRB 652 (1978), the Hearing Officer determined that the no-strike clause of the Teamsters contract cannot be read as a waiver of the employees' right to engage in a sympathy strike. He further noted that extrinsic evidence of the most recent contract negotiations reveals that the subject of sympathy strikes was not specifically addressed by the parties. He thus concluded by inference that the contract did not prohibit the employees from engaging in sympathy strikes and that the seven challenged voters were, in fact, eligible to vote.[3]

We do not agree with the majority's adoption of the Hearing Officer's findings and recommendations in this regard. We are in accord with the views expressed by former Member Penello in his concurring opinion in *Davis-McKee* and, thus, we would find that the employees were lawfully terminated by the Employer pursuant to the no-strike clause and thus were not eligible to vote.[4]

The no-strike clause of the contract provides:

> Except as otherwise provided herein, there shall be no strike, slow down, or picket line placed before the premises of the Company by the undersigned Union during the term of this Agreement. There shall be no lockout on the part of the Company nor shall employees be

[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was seven for, and nine against, the Union; there were seven challenged ballots.

[2] The issue in this case is whether seven drivers engaged in a sympathy strike at the Employer's facility were eligible to vote in the election. The Employer contends that the drivers abandoned their employment because, *inter alia*, they failed to return to work after being notified they were in violation of the no-strike clause in the contract. Relying on *International Union of Operating Engineers, Local Union 18, AFL-CIO (Davis-McKee, Inc.)*, 238 NLRB 652 (1978), and *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925, the Hearing Officer rejected the Employer's contention, finding that the collective-bargaining agreement did not waive the employees' right to engage in sympathy strikes. We agree.

Our dissenting colleagues state that the drivers were lawfully terminated by the Employer for breaching the contract's no-strike clause. There is no evidence in the record, however, that the Employer took any action to terminate the striking drivers. The Employer does not contend otherwise, for it argues that the employees quit their jobs. Since the Employer did not discharge the drivers, we fail to see the relevance of any discussion concerning the justification for such action under the contract.

[3] As a preliminary matter, the Hearing Officer found that the striking employees were never terminated by the Employer since the Employer never provided them with termination notices.

[4] The failure to provide termination notices to these employees was not a critical omission on the part of the Employer inasmuch as the telegrams were sufficient to put the employees on notice that they would be fired unless they returned to work. The second paragraph of art. IX, sec. 1 (the no-strike provision), provided that, if such stoppage continues beyond 8 hours, the Company has the sole right to discharge any employee participating. When such clause is viewed in light of the employees' extended strike which continued from September 2, 1980, through at least the date of election herein on June 19, 1981, and the telegrams warning of thier replacement and the subsequent hire of replacements, a *de facto* tertmination obviously occurred.

> laid off, transferred or discriminated against in any manner to avoid the intent of this Agreement. It is the intention of the parties that all matters in dispute covered by this Agreement shall be settled in accordance with the arbitration procedure, except as provided for herein.

In addition, the contract gives the Employer "the sole and complete right [after the first 8 hours] to immediately discharge any employee participating in any unauthorized strike, slow down, walk-out, or *any other cessation of work* . . . ." (Emphasis supplied.)

In his concurring opinion in *Davis-McKee*, former Member Penello, after a painstaking review of the pertinent case law, concluded that:

> Where the parties to a collective-bargaining contract embody in the agreement a clause stating essentially that there shall be no strikes during the term of the agreement, it means that there shall be no strikes during the term of the agreement—unless extrinsic evidence indicates that the parties intended otherwise.[5]

In the instant case, the parties agreed that there would be no strike, slow down, or any other cessation of work during the term of the contract. Unless there is extrinsic evidence to show otherwise, the parties shall be presumed to have intended that sympathy strikes were to be prohibited. Testimony by the Employer's vice president, which was credited by the Hearing Officer, revealed that the subject of sympathy strikes was never specifically addressed by the parties during the negotiations which led to the most recent contract. Thus, there is no extrinsic evidence to overcome the literal wording of the no-strike clause, and, accordingly, the employees were not privileged to engage in a strike in sympathy with the Engineers.[6] The Employer was therefore free to terminate them for violating their contract and, inasmuch as their discharges were lawful, the employees were not eligible to vote in the decertification election.

[5] 238 NLRB at 661.

[6] It is illogical to find that a union can agree to waive employees' rights to strike, slow down, or cease work against their own employer and then argue that a lesser right, the right to engage in a sympathy strike involving another employer, is not encompassed by that clause.

APPENDIX

The Strike, Picketing and Related Issues:

Commencing on September 2, 1980, certain employees employed by the Employer and represented by the International Union of Operating Engineers, Local 406 (herein called Engineers), engaged in a strike and picketing activities against the Employer in support of their economic demands.[5] Beginning on and about that date, certain unit employees of the Employer represented by General Truck Drivers, Warehousemen & Helpers, Local No. 5, including Johnny Milliken, Ray Douglas, Robert Lee Bryant, Ike Wallace, Lee Roy Keller, John L. Washington, and Roy Collins who cast the challenged ballots in the June 19, 1981, election, engaged in a strike in sympathy with the enconomic demands of the Engineers. The above-named individuals all refused to cross the picket line established by Engineers, Local 406, and have not returned to work for the Employer since September 2, 1980.

We have here three issues for resolution. The primary issue is whether the striking drivers were eligible to cast ballots in the June 19 election. As sub-issues, the legality of their sympathy strike and their employee status on June 19, 1981, are relevant to the resolution of the eligibility question.

The Board has held that employees honoring a picket line of employees engaged in a lawful economic strike have the same status as the strikers with whom they sympathize. *American Telephone & Telegraph Co.*, 231 NLRB 556; *Southern Greyhound Lines*, 169 NLRB 627; *Canada Dry Corporation*, 154 NLRB 1763. None of the parties to this proceeding, or Engineers, Local 406, whose representative was present and testified at the hearing, have contended that the primary dispute was other than lawful and economic in nature. Employer contends that after commencement of the strike and prior to the election the positions previously occupied by the challenged individuals were permanently filled. Generally, the Board has determined that sympathy strikers shall be viewed as economic strikers who maintain eligibility to vote in any representation election conduct within the 12-month period following the commencement of the strike, in accordance with Section 9(c)(3) of the Act. *Levitz Furniture Company of the Eastern Region, Inc.*, 248 NLRB 15.

At the hearing, Employer's counsel adduced evidence in support of its contention that Engineers, Local 406, had abandoned its strike at a time prior to the election. In support of this contention it pointed toward a substantial hiatus in picketing activity by operators at Employer's facility in Baton Rouge, Louisiana. The evidence is inconclusive as to the precise duration of this hiatus in picketing at the Employer's facility. However, Carter L. Carpenter, Engineers' Assistant Business Agent, credibly testified as to the continuing strike and picketing activity against the Employer. Carpenter testified that in the early months of the strike the Engineers utilized at the gates of Employer's premises. As the strike continued, the Engineers varied its picketing strategy from that of picketing at the Employer's premises to that of utilizing ambulatory pickets to follow Employer's concrete trucks as they would leave Employer's facility and then to picket at the situs of delivery of the struck product. This tactic, utilizing ambulatory pickets, commenced in December 1980, and was the prevalent picket tactic utilized

[5] Engineers, Local 406, is the collective bargaining representative of the Employer's employees in a unit of operators. Its contract with the Employer expired on August 22, 1980.

by the operators until about the date of the election. The evidence established that picketing occurred at the Employer's facility around June 19, 1981, and has continued, on occasions, since the election. The evidence was clear that neither Engineers, Local 406, Teamsters Local 5, or the employees notified Employer on or prior to June 1981, of any intent to abandon the strike. Events occurring after the date of the election are irrelvant to a determination of voter eligibility on June 19, 1981. The totality of the evidence of this point clearly establishes that Engineers, Local 406 continued to engage in strike activities with an object of obtaining economic concessions up to the time of the election, and neither the Engineers nor the Teamsters acted to abandon the strike prior to the election. Picketing activitiy need not be continuous in order to establish the continuing nature of a strike. *Bright Foods, Inc.*, 126 NLRB 553. The Engineers' use of ambulatory, as opposed to stationary, pickets merely reflects a shift in picket strategy. Hence, the evidence is clear that at all times since September 2, 1980, Engineers, Local 406, has engaged in an economic strike, including picketing of the Employer, to and including June 19, 1981, the date of the election. And during this period neither the Engineers nor the Teamsters terminated or abandoned the strike.

Applicability of Article IX, Section 1, of the Collective Bargaining Agreement:

At the time of the commencement of the sympathy strike by the employees represented by the Teamsters, there was a collective bargaining agreement in effect between the Employer and the Teamsters.

Article IX, Section 1, of said agreement provides as follows:

> "Except as otherwise provided herein, there shall be no strike, slow down, or picket line placed before the premises of the Company by the undersigned Union during the term of this Agreement. There shall be no lockout on the part of the Company nor shall employees be laid off, transferred or discriminated against in any manner to avoid the intent of this Agreement. It is the intention of the parties that all matters in dispute covered by this Agreement shall be settled in accordance with the arbitration procedure, except as provided for herein."

The second paragraph of Article IX, Section 1, further provides:

> "After the first eight (8) hour period of such stoppage and if such stoppage continues, however, the Company shall have the sole and complete right to immediately discharge any employee participating in any unauthorized strike, slow down, walk-out, or any other cessation of work, and such employee shall not be entitled to or have any recourse of any other provisions of this Agreement."

It is the contention of the Employer that before the Teamsters could engage in a sympathy strike they were required to arbitrate whether Article IX, Section 1, allowed them to engage in a sympathy strike. When these employees refused to return to work after the Employer sent striking employees telegrams advising them of Employer's position that they were in violation of the "no-strike" clause of the agreement and asking them to return to work under threat of permanent replacement, and later dispensed notices to employees individually, stating, "You are subject to he [sic] permanently replaced. . . ," Employer contends that the drivers abandoned their employment with Stevens. Employer argues that there was no need for it to give any notices of termination to striking employees, which action it did not take, since it is Employer's practice not to give termination notices when an employee quits or abandons his employment. Employer argues that the language of Article IX, Section 1, read as a whole, constitutes a waiver of these employees' right to engage in a sympathy strike. As to the term of the agreement, Article XII provides that it will remain in force to "February 22, 1981, and shall continue in full force and effect from year to year thereafter unless written notice of desire to cancel, terminate or amend the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration." No written notice of termination was entered into evidence at the hearing. Moreover, Teamsters Business Agent Allen Jones testified that he made a verbal agreement with Employer's counsel during contract negotiations in early 1981 (the record is silent as to the date) the 1978-1981 agreement would continue in force on a day by day basis until either party notified the other party that the agreement was terminated. Roland Stevens, Jr., Vice President of the Employer, testified that he does not recall making such an extension of the agreement. However, the testimony of Mr. Jones in this regard was unrefuted by other testimony or evidence and is, therefore, credited.

Mr. Stevens acknowledged that the Employer did not issue termination notices to the striking employees represented by the Teamsters. In fact, during the February 1981, contract negotiations there was some negotiation as to the terms for reinstatement of these employees. Before a prospective voter can be regarded as having been discharged, there must be some unequivocal evidence of termination. *Servomation of Columbus, Inc.*, 219 NLRB 504. Notice of discharge normally must be communicated to an employee by some effective means. *Otarion Listener Corporation*, 124 NLRB 880; *Miami Rivet Company*, 147 NLRB 470; *Pacific Gamble Robinson Company*, 171 NLRB 541, enfd. 438 F.2d 112 (9th Cir. 1971). Here there is no evidence of termination and no comunication thereof. I find that the sympathy strikers were never terminated by the Employer, either for engaging in a sympathy strike or for any other reason.

Of relevance to the parties' bargaining table interpretation of Article IX, Section 1, of the agreement, is the Employer's "no-strike" language proposal in the February 1981, negotiations. At these negotiations, Employer prepared and proposed a contract proposal containing, in Article XII, a new no-strike/no-lockout provision which would have eliminated any employee right, by specific reference, to engage in a sympathy strike. Regarding his

proposed language, Mr. Jones testified that Employer's counsel explained that Employer wanted to break away from past experiences concerning sympathy strikes. Mr. Jones' testimony on this point remained unrefuted and must stand as credited.

With regard to the 1978 negotiations concerning the intent of Article IX, Mr. Stevens succinctly testified that there was no specific understanding as to the application of this language to sympathy strikes. In this regard Mr. Stevens testified as follows in response to these questions of Counsel for the Regional Director:

> Q. Was there any discussion with respect to what a union would do when a union member employed by you went on strike, how that other union member of the other union would be affected by this?
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> A. Not to my knowledge.
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> Q. Simply put, was there any discussion about the very situation we have here at issue, on whether the Teamsters could sympathize with the Operating Engineers and refuse to go to work?
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> A. No, sir, there wasn't any discussion about it. It was understood there would be no strikes. Everything would be arbitrated.
>
> Q. Everything would be arbitrated?
>
> A. That's right. If there was grievance, it would be brought before arbitration. There would be no strikes by the employees of the company.
>
> Q. And that's your understanding of the negotiations for Joint Exhibit No. 1?
>
> A. That's correct

Teamsters' representatives corroborated this aspect of Mr. Stevens' testimony, which is credited.

In support of its position that the terms of the agreement required the Union to submit the issue of the permissibility of a sympathy strike to an arbitrator prior to striking, Employer largely relies upon a decision of the Seventh Circuit Court of Appeals in the case of *N.L.R.B.* v. *Keller-Crescent Company*, 538 F.2d 1291, 92 LRRM 3591 (1976). In the context of an unfair labor practice proceeding alleging unlawful discipline of employees in violations of Section 8(a)(1) and (3) of the Act, the Court refused to enforce an order of the Board, finding that the Union was required to submit the dispute to arbitration.

In *Keller-Crescent Company*, the Seventh Circuit declined to enforce the Board's finding that the company violated Section 8(a)(1) and (3) when it disciplined 12 employees because they refused to cross a lawful picket line established by fellow employees who were members of another union. The company had warned the 12 that their conduct was prohibited by a bargaining agreement clause which permitted sympathy strikes only in support of sister locals. The court's decision turned on its interpretation of this provision in conjunction with a no-strike arbitration clause which aplied to "all disputes" about "alleged violations[s]" of the agreement. In the court's view, the company, by claiming a violation of the sympathy strike clause, had raised an issue which the employees were obligated to resolve through the arbitration procedure before they were permitted to strike.

In the present case, Article IX, Section 1, provides that all matters in dispute shall be settled by arbitration. Article VIII additionally states that in the instance of a disagreement as to the interpretation or application of the terms of the agreement, it shall be settled by arbitration.

Aside from the fact that the undersigned endeavers to administer a national labor relations policy enunciated by the jurisprudence of the National Labor Relations Board, rather than the Seventh Circuit, *Keller-Crescent* is eminently distinguishable from the instant case. As opposed to an issue of unlawful discrimination in an unfair labor practice proceeding, the instant case poses here the issues of employees' eligibility under Section 9(b)(3) of the Act to cast ballots in a Board election, a matter solely within the discretion of the Board. Here, the Employer did not act to discharge the striking employees. Neither the Union nor employees could reasonably be required to file a grievance in advance of a Board election, or in advance of their participation in a strike, in an effort to determine their eligibility to cast ballots in a Board election. In essence, there was no "dispute" or "disagreement" between the parties prior to the election warranting presentation to an arbitrator. The Board has not adopted the view advanced by the Seventh Circuit that employees must assume the existence of a dispute and first present the issue of the status of their strike to an arbitrator in advance of engaging in an activity protected by Section 7 of the Act., i.e., a sympathy strike.

In the instant case the no-strike clause of the agreement did not evidence a "clear and unmistakable" intent to relinquish the employees' right to engage in sympathy work stoppages, which is the current test applied by the Board. *International Union of Operating Engineers, Local Union 18 (Davis-McKee, Inc.)*, 238 NLRB 652 (1978); *Gary-Hobart Water Corporation*, 210 NLRB 742 (1974), enfd. 511 F.2d 284 (7th Cir. 1975), cert. denied 423 U.S. 925. In *Davis-McKee*, the Board held:

> We will not infer a waiver of the protected right to engage in sympathy strikes solely from an agreement to refrain from all "stoppages of work." Rather, we shall require that the parties at the very least have discussed the question and, perferably, have expressly embodied in their agreement their intent to extend a strike ban to sympathy strikes.
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> *Supra* at 652.

The no-strike language present in the agreement here does not refer specifically to prohibition of sympathy strikes, and thus, on its face, is insufficient to be read as a waiver of the right to participate in such work stoppages. The remaining question is whether extrinsic evidence discloses clearly that the clause was specifically intended to forbid sympathy strikes. Here, the extrinsic evidence from the 1978 contract negotiations establishes that sympathy strikes were not specifically addressed. Thus, regardless of any arbitration provisions, it is clear that the governing collective-bargaining agreement did not relinquish these employees' right to participate in protected sympathy strikes. *Chevron U.S.A., Inc.*, 244 NLRB 1081; *Gary-Hobart Water Corporation, supra*; *Kel-*

logg Company, 189 NLRB 948 (1971), enfd. 457 F.2d 519 (C.A. 6, 1972); *The Timken Roller Bearing Company*, 138 NLRB 15 (1962), enfd. 325 F.2d 746 (C.A. 6), cert. denied 376 U.S. 971 (1963); cf. *N.L.R.B.* v. *Rockaway News Supply Company, Inc.*, 345 U.S. 71 (1953), and *Hearst Corporation, News American Division*, 161 NLRB 1405 (1966).